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No. 03-1160

In the

# Supreme Court of the United States

ADEL P. SMITH, et al.,

*Petitioners,*

v.

CITY OF JACKSON, MISSISSIPPI, et al.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Respondent City of Jackson. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF considers this case to be significant in that it concerns the scope of disparate impact, a doctrine that is often counterproductive to the public interest. PLF has filed amicus briefs addressing the inequities of disparate impact analysis in *Adams v. Florida Power Corporation*, 535 U.S. 228 (2002), and *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999).

## STATEMENT OF THE CASE

This Court granted certiorari to determine the following question.

Whether disparate impact claims are cognizable under the Age Discrimination in Employment Act?

The facts of this case are simply stated. In order to bring starting salaries up to the regional average, the City of Jackson adopted a pay plan that granted proportionately larger pay increases to police officers with less than five years tenure. Thirty officers and dispatchers, all over the age of forty, sued

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

the City alleging that it had discriminated against them because of their age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, et seq. The United States District Court for the District of Mississippi granted summary judgment to the City. *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003). On appeal, the Fifth Circuit affirmed that the ADEA was not intended to remedy age disparate effects that arise from employment policies that are not based on age. *Id.* at 187. This Court granted certiorari.

## SUMMARY OF ARGUMENT

The wording of the ADEA shows Congress intended to address only intentional discrimination on the basis of age and not policies or acts that merely have a disparate impact. This Court developed disparate impact analysis to combat the vestiges of intentional discrimination and not mere statistical disparities.

It has been administrative agencies and the courts that created disparate impact liability. Congress has only sought to limits its application. This Court has also sought to limit disparate impact liability by requiring proof of intentional discrimination in Equal Protection Clause cases.

Public policy considerations counsel against any expansion of disparate impact analysis. Disparate impact liability in the ADEA is based on administrative regulations that contravene the intent of Congress. Requiring proportional impact leads to implementation of quota systems that are the antithesis of congressional policy in enacting the ADEA. The decision below should be affirmed.



## ARGUMENT

## I

## CONGRESS DID NOT INTEND TO CREATE DISPARATE IMPACT LIABILITY UNDER THE ADEA

### A. The Plain Wording of ADEA Encompasses Only Disparate Treatment

The ADEA, 29 U.S.C. § 621, et seq., provides in pertinent part:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .
>
> . . . .
>
> (f) It shall not be unlawful for an employer . . . .
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . .

29 U.S.C. § 623.

The issue is whether this language imposes disparate impact liability. This Court noted in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that it has long "distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." *Id.* at 609.

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
>
> Claims that stress disparate impact [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory.

*Id.* (internal quotation marks omitted).

The language of the ADEA makes clear that the disparate treatment theory is available under the ADEA. *Id.* "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Id.* at 610. As this Court explained:

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.

*Id.*

While this Court specifically stated that it was not deciding whether a disparate impact theory of liability is available under the ADEA, *id.* at 610, its language in *Hazen*



*Paper* strongly suggests that the answer is no. This Court declared:

> Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

*Id.* at 611 (citation omitted).

The Court explained: "When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* The essence of the disparate impact theory is the correlation of a facially neutral factor with the protected status. Thus, the mere fact that conduct motivated wholly by factors other than age falls more heavily on the protected age group does not give rise to an ADEA violation. As this Court explained, ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore." *Id.* at 612.

### B. Disparate Impact Liability Was Developed to Combat Intentional Discrimination; Mere Statistical Disparity Does Not Constitute Discrimination

The doctrine of "disparate impact" saw its initial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, this Court ruled that an employer's requirement that job applicants have completed high school and pass a general intelligence test discriminated against blacks in violation of

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin),[2] because it excluded a higher proportion of blacks than whites and was not demonstrably related to actual ability to do the work. *Griggs,* 401 U.S. at 431-32. The ruling in *Griggs* was clearly influenced by the fact that the employer had a history of overt racial discrimination which had apparently ceased after the enactment of the Civil Rights Act of 1964, although the employer continued to follow policies that had a markedly disproportionate effect on blacks. *Id.* at 428-29. The actuality of intentional discrimination was shown by the fact that Duke Power adopted the new requirements on the day that Title VII went into effect and specified that it would not apply to white employees already hired. *Id.* at 427. These facts suggest the employer was using facially neutral criteria as a proxy for racial discrimination.

*Griggs* created the following standard: "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . . If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

Although *Griggs* expanded the reach of Title VII to include disparate impact, it attempted to limit the measure's scope:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

*Id.* at 430-31.

The scope of the ADEA is even more limited. Section 4(f)(1), 29 U.S.C. § 621(f)(1), permits an employer to take any action otherwise prohibited under the ADEA "where the differentiation is based on reasonable factors other than age." *Id.* There is no similar provision in Title VII. However, a similar provision in the Equal Pay Act, 29 U.S.C. § 206(d)(1), exempts pay differentials "based on any other factor other than sex." In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court found that this language was inconsistent with disparate impact liability and indicated the intent of Congress to limit Equal Pay claims to disparate treatment. *Id.* at 170. The "reasonable factors other than age" proviso in the

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[2] As pointed out in Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 844 (1982) (Krop), the legislative history of Title VII indicates that Congress did not originally intend to authorize disparate impact claims, citing the interpretive memorandum by its floor managers, Senators Clark and Case, in the Congressional Record. That memorandum specifies that the Act only prohibits practices by which an employer segregates or classifies employees "on the basis of" race, religion, sex or national origin. 110 Cong. Rec. 7212 (1964). Krop reasons that if Congress did not intend Title VII to encompass disparate impact claims, it similarly did not intend to include them in the ADEA. 34 Stan. L. Rev. at 844.

ADEA similarly evidences congressional intent to limit the ADEA to disparate treatment claims.

This fact is buttressed by the legislative history of the ADEA, which was enacted following the presentation of a Secretary of Labor report regarding problems of older workers. As Krop notes, "[t]he Secretary found no evidence of prejudice against older workers and concluded that the main problem was arbitrary age discrimination based on misconceptions about the abilities of older workers." 34 Stan. L. Rev. at 853 (citing U.S. Dept. of Labor, *The Older American Worker: Age Discrimination in Employment* at 2 (1965)).

Further, the type of discrimination faced by older workers is significantly different from that based on race, sex, or nationality. Not only have older workers not suffered from lifelong discrimination, but the discrimination they face is not a product of invidious stereotypes and hatred. *See* Krop, 34 Stan. L. Rev. at 852. That commentator, *id.*, cites *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), for its holding that unlike those who have been discriminated against on the basis of race, the aged have not historically experienced purposeful unequal treatment or been subjected to disabilities on the basis of stereotypes.

### C. The Sole Rationale for Disparate Impact Is Preventing Pretexts for Discrimination

The only legitimate purpose behind the development of the disparate impact theory would be to prevent the use of facially neutral standards as a pretext for racial discrimination, not to require race quotas. This was made clear in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989):

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review *would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.*

*Id.* at 659 (emphasis added).

The Court reemphasized this point in noting that plaintiffs could show that other selection devices without a similarly undesirable impact would also serve the defendant's legitimate interests. By such a showing, the plaintiffs "would prove that [defendant was] *'using [its] tests merely as a "pretext" for discrimination.'*" *Id.* at 660 (emphasis added). The Court thus suggested that the disparate impact doctrine was intended to address pretexts for discrimination, not mere numerical disparities.

However, the Court has not been consistent in stating that disparate impact is merely the manifestation of pretextual discrimination. *Griggs*, 401 U.S. at 432, found that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer had violated the statute. Yet, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court stated that a showing that other tests or selection devices were available that served the employer's legitimate business needs but did not have an undesirable racial effect would be evidence that the employer was using its tests as a pretext for discrimination. *Id.* at 425. *Albemarle* was followed by *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979), which rejected a claim that an employer's strict drug abuse enforcement policy had a disparate impact on minorities. The Court ruled that the trial court's finding that the policy was not motivated by racial animus "forecloses any claim . . . that it was merely a pretext for intentional discrimination." *Id.* at 587.

Next, *Connecticut v. Teal*, 457 U.S. 440 (1982), in rejecting the so-called "bottom line" defense of racial proportionality in the workforce[3] for disparate impact cases, declared that, even if the employer shows the job relatedness of a test, "the plaintiff may prevail if he shows that the employer was using the practice as a mere pretext for discrimination." *Id.* at 447. *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 (1988), cited factors such as the cost of proposed alternative employee selection devices as "relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment." *Id.* at 998.

On the other hand, *Watson* also stated that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* at 987. It would thus appear that the Court has not been able to decide on the precise rationale behind the disparate impact doctrine. However, since the purpose of civil rights laws is to preclude intentional discrimination, the only proper basis for disparate impact analysis is when the challenged policies or acts are pretexts for discrimination.

[3] The bottom line defense argued that if an employer achieved racial proportionality in its workforce, it did not matter if any employment or promotion practice was racially biased. *Id.* at 442.



## II

## THE COURTS AND ADMINISTRATIVE AGENCIES, NOT CONGRESS, HAVE EXTENDED DISPARATE IMPACT ANALYSIS TO OTHER LAWS

### A. Administrative Agencies Have Sought to Expand the Scope of Disparate Impact Analysis to Other Laws

The disparate impact doctrine was extended to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq., in *Lau v. Nichols.* 414 U.S. 563 (1974). There, nonEnglish-speaking students of Chinese ancestry sued San Francisco school officials alleging that the school district's failure to provide equal educational opportunities violated the Fourteenth Amendment and Title VI. *Id.* at 566. The Court did not reach the Equal Protection Clause argument but instead relied solely on Section 601 of Title VI. *Id.* Although the Court did not use the term "disparate impact," it cited Department of Health, Education & Welfare (HEW) regulations[4] issued pursuant to Section 602 that barred acts that have the effect of discrimination, even though there is no purposeful design to discriminate. *Id.* at 568.

The concurring opinion of Justice Stewart, joined by the Chief Justice and Justice Blackmun, raised a fundamental issue: "The critical question is . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601." The concurrence noted that the validity of a regulation promulgated under a general authorization provision such as

[4] The Court also took note of HEW guidelines that required federally funded school districts to rectify students' language deficiencies. *Id.* at 566-67.

Section 602 of Title VI "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Id.* at 571 (footnote omitted).

This rationale was rejected by *Alexander v. Sandoval*, 532 U.S. 275 (2001), which found that *Lau* interpreted Section 601 itself to prohibit disparate impact discrimination. *Id.* at 285. The Court then noted it

> must face now the question avoided by *Lau*, because we have since rejected *Lau*'s interpretation of § 601 as reaching beyond intentional discrimination. . . . It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations. *Id.*

Although phrased in terms of the private right of action issue, this recognition that disparate impact regulations forbid conduct permitted by statute signals that where Congress has not authorized disparate impact liability, it may not be created out of whole cloth by administrative fiat.

### B. Congress Has Limited Disparate Impact Liability

Although Congress has acknowledged the courts' imposition of disparate impact analysis on the statutory scheme of Title VII, it has shown its discomfort with the concept by moving to limit its application. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, for the first time expressly stated that the disparate impact theory applies in Title VII. *See, e.g.*, Section 4, 42 U.S.C. § 2000e-2. And while the Act purported to "respond to the Supreme Court's recent decisions



by restoring the civil rights protections that were dramatically limited by those decisions," Section 2.b, the Act contained substantial limitations on disparate impact liability. Thus Section 102, adding section 1977A, 42 U.S.C. § 1981, provided for damages in actions brought under sections 706 or 717 of the 1964 Civil Rights Act in cases of intentional discrimination but specifically excluding "an employment practice that is unlawful because of its disparate impact."

In Section 106 of the 1991 Act, Congress further restricted the use of disparate impact analysis in test scores through the enactment of Section 703(l), entitled "Prohibition of Discriminatory Use of Test Scores":

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(*l*). Thus even though cutoff scores, for example, may have a disparate impact on the basis of race or sex, employers are prohibited by Section 703(*l*) from adjusting those scores to achieve a more proportional result.

Congress also limited the use of disparate impact analysis by prohibiting the award of punitive damages in such cases. Thus, an action brought under Section 706, 42 U.S.C. § 2000e-5, of the Civil Rights Act, may recover compensatory and punitive damages by alleging unlawful intentional discrimination but not where the charge is only one of disparate impact. *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994).

These provisions show that while Congress has acceded to this Court's imposition of disparate impact liability in Title VII, it has limited its application. More relevant here, there is no indication that Congress ever intended to permit expansion of the doctrine beyond Title VII to other laws such as the ADEA.

## III

## RECOGNIZING THE FLAWS OF DISPARATE IMPACT, THIS COURT HAS LIMITED ITS APPLICATION

Although this Court has recognized the concept of disparate impact liability, it has been uneasy with its application and has often sought to limit it. In *Washington v. Davis*, 426 U.S. 229 (1976), black applicants for a police training program sued under the Equal Protection Clause alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the test on blacks as compared to whites. *Id.* at 233. The Court held that the petitioners had failed to prove a violation of the Equal Protection Clause. *Id.* at 242. The Court declared that discriminatory intent is the critical element in an equal protection claim and, though disparate impact is not irrelevant to such claim, it is not sufficient as proof of intent. *Id.*

In *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252 (1977), nonprofit housing developers planned to develop a tract of land in a racially diverse neighborhood for residents with low to moderate incomes. When the village refused to rezone the land for multifamily housing, the developers sued under the Equal Protection Clause, alleging the refusal was racially motivated. *Id.* at 258-59. The Court found that the plaintiffs had failed to prove the key element of discriminatory intent. *Id.* at 270. The



Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 253.

The applicability of disparate impact in cases of alleged sex discrimination was addressed in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). *Feeney* involved an equal protection claim that the award of veterans' preference in employment had a disparate impact on women, proportionably fewer of whom were veterans. The Court noted that *Washington v. Davis* and *Arlington Heights* recognized that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. But the Court found that those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results, and this principle applies with equal force to a case involving alleged sex discrimination. *Id.* at 273-74. As the Court concluded:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

*Id.* at 274 (internal citations and quotation marks omitted).

The Court emphasized this point in *Lewis v. Casey*, 518 U.S. 343 (1996) (involving prisoners' right of access to the courts), noting that it rejected the disparate impact theory of the Equal Protection Clause in *Washington v. Davis*.

> There we flatly rejected the idea that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution, solely because it has a . . . disproportionate impact.

*Id.* at 375 (internal citations and quotation marks omitted).

The Court read *Davis* as "acknowledging the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* (internal citations, quotation marks, and parentheses omitted).

*Lewis* recognized that the *Davis* Court was motivated in no small part by the potentially radical implications of the disparate-impact rationale.

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than the indigent. Under a disparate-impact theory . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. . . . [W]e rejected in *Davis* the disparate-impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

*Id.* at 376-77 (internal citations and quotation marks omitted).

These acknowledged dangers of the disparate impact rationale apply to the doctrine's application to the ADEA.

## IV

## SOUND PUBLIC POLICY REASONS REJECT EXPANSION OF DISPARATE IMPACT LIABILITY TO THE ADEA

### A. Disparate Impact Liability Is Based on Unauthorized Administrative Regulations

The Equal Employment Opportunity Commission (EEOC), the agency charged with administration of the ADEA, has issued regulations applying disparate impact liability to the ADEA. 29 C.F.R. § 1625.7 (1981). This Court has recognized that "Congress, in enacting Title VII, did not confer upon EEOC authority to promulgate rules or regulations," and specified that the level of deference due EEOC regulations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it a power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). This Court then added that where the EEOC's interpretation is neither "contemporaneous with the statute's enactment nor consistent

since the statute came into law" or "lacks support in the plain language of the statute," it is not entitled to judicial deference. *Id.* at 257-58.

As set forth in Douglas C. Herbert and Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. Tex. L. Rev. 625 (1996) (Herbert and Shelton), the administrative interpretation regarding the application of disparate impact theory to the ADEA has not been consistent. *Id.* at 643. The Department of Labor was charged with administration and enforcement of the ADEA until 1978. *Id.* (citing Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3781, 3 C.F.R. § 321 (1979)).

> The Department of Labor initially interpreted the ADEA to require only "reasonableness" to be determined "on an individual, case by case basis." [Citing 29 C.F. R. § 860.103(d) (1968).] The ADEA was specifically exempted from the Uniform Guidelines on Employee Selection Procedures, which address the validation of tests with a disparate impact, in 1978. [Citing 29 C.F.R. § 1607.2 (1978).] It was not until 1982 that the EEOC issued regulations stating that the ADEA incorporated the disparate impact theory. [Citing 46 Fed. Reg. 47727 (Sept. 29, 1981), adopting 29 C.F.R. § 1625.7(d).]

Herbert and Shelton, 37 S. Tex. L. Rev. at 643.

This belated shift of interpretation, coupled with the language of the statute, demonstrates that the EEOC contrary interpretation is not entitled to judicial deference.

This Court's growing concern with abuse of the administrative regulatory process was signaled in *Solid Waste*



*Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). In invalidating regulations implementing Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a) (regulating the discharge of dredged and fill material into navigable waters), the Court declared:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

*Solid Waste*, 531 U.S. at 172-73.

This rule was reemphasized in the context of Title VI by *Alexander v. Sandoval*. This Court there held that while a private cause of action exists to enforce Section 601 prohibiting disparate treatment, that right does not extend to the enforcement of disparate impact regulations promulgated under Section 602. 532 U.S. at 293.

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been

> authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

*Id.* at 291.

In the ADEA context, where Congress has not created a disparate impact cause of action in the statute itself, federal agencies may not engage in administrative sorcery to create that right through regulations.

The disparate impact regulation is based on the fundamental legal error that administrative regulations may interpret a law contrary to the intent of the legislative body that enacted it. In order not to invalidate a whole range of employment policies that inadvertently may be more burdensome in their effect on older workers, Congress intended the ADEA to follow Fourteenth Amendment law and apply only to intentional discrimination. Administrative agencies have no power to alter that policy judgment by extending the law's reach to ban programs that have a disproportionate impact on certain age groups.

**B. Disparate Impact Liability Raises the Specter of Quotas**

The potential for administrative regulations to be applied in such a manner as to require the use of quotas in direct opposition to the intent of Congress and the mandate of the Fourteenth Amendment was noted with disfavor in *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 992.

> We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord



> with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such.

*Id.* at 992.

*Watson* arose in the context of Title VII allegations of employment discrimination. The Court noted that preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution "and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.' " *Id.* at 993 (citations omitted). The Court observed:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent.

*Id.*

The same logic applies to ADEA. Allowing this law to evolve into a mandate for age-based quotas would be contrary to Congress' clear intent.

It is time for the courts to rethink the use of disparate impact analysis. When a disparity is caused by intentional discrimination, it should be remedied in an appropriate manner. That is what Congress intended in the enactment of the ADEA and the Civil Rights Act. But when a disparity is the result of policies that result not from intentional discrimination but from neutral factors, the courts should decline to intervene. By focusing on intentional discrimination, the courts can ensure that it is rooted out wherever it may be found. At the same time, by discarding the disparate impact doctrine, the courts can guard against outcomes that, while well-meaning in intent, are counterproductive in practice.

## CONCLUSION

For the reasons stated above, the decision of the Fifth Circuit should be affirmed.

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Respectfully submitted,

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